IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ISABEL RUBINAS, and IJR CORP., Plaintiffs, v. NICOLAS MADUROS, DIRECTOR, CALIFORNIA DEPARTMENT OF TAX & FEE ADMINISTRATION, Defendant.	)))))))))))	 Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Isabel Rubinas, for her Complaint against Defendant, Nicolas Maduros, Director, California Department of Tax & Fee Administration, states as follows:

Summary of Claims

1. This is an action for declaratory and injunctive relief arising out of California tax officials' unconstitutional demand for money from non-Californians to make up for the state's subsidies to Amazon. In this instance, California's tax collectors have reached deep into Illinois to crush a small children's clothing boutique owner. Not because of what she did, but because of what California tax officials did for nearly a decade and now need to clean up—they let Amazon avoid collecting taxes on most sales in Amazon's store. Years later, the state decided it wanted those taxes after all. But since Amazon is powerful, and non-resident small business owners like Ms. Rubinas are not, California has decided to target them to cover Amazon's debts. By demanding that Ms. Rubinas pay for taxes that the agency let Amazon avoid collecting, California is violating Ms. Rubinas's rights under the Internet Tax Freedom Act, the Due Process Clause, and the

Commerce Clause. Ms. Rubinas brings this action to prevent further violations of federal law and the accordant destruction of her business.

Introduction

2. For most of the last decade, California's Department of Tax & Fee Administration (CDTFA) allowed Amazon to refuse to collect sales taxes on most sales in its store, Amazon.com. That gave Amazon an instant pricing advantage over its competitors, who did collect taxes. In exchange, Amazon gave the state "benefits" in the form of promised development. That might just be a bad deal for Californians and competing businesses, but recently CDTFA decided to take it further. California wants those uncollected taxes after all—not from Amazon, but from Amazon's suppliers outside the state, who tend to be small businesses and have none of Amazon's political or economic power within California. According to California, those non-resident small businesses are now liable for the very taxes the agency let Amazon refuse to collect. Back to 2012. The amounts are crushing, and when California's targets don't pay—most can't—the state will seize their bank accounts.

3. California's Treasurer, Fiona Ma, has criticized CDTFA's actions as "unlawful, unconstitutional, and impractical," and pleaded with Governor Newsom to stop CDTFA from arbitrarily destroying peoples' livelihoods.[1] But CDTFA continues to exceed its lawful authority and inflict damage on the interstate marketplace and small businesses outside of California.

[1] March 8, 2019 Letter from Treasurer Fiona Ma, CPA, to Governor Gavin Newsom, Exhibit 1. Prior to her service as Treasurer, Ms. Ma was Chair of the California Board of Equalization, which at the time was the state's sales tax agency.

4. Plaintiff Isabel Rubinas is one such target. This case should not be necessary, because what is happening to Ms. Rubinas should not happen in a society founded on the rule of law. But it is happening—to her and thousands of other Illinoisans and Americans.[2]

5. Ms. Rubinas owns a children's clothing boutique, Lollipop Seeds, which she operates from her kitchen table in Glen Ellyn.[3] Most of Ms. Rubinas's sales take place via Amazon's store, Amazon.com. Ms. Rubinas participates in Amazon's Fulfilled by Amazon (FBA) program, which uses a consignment model. Essentially, Ms. Rubinas supplies goods to Amazon, which Amazon warehouses in a network of nearly 200 facilities in North America. Amazon promotes products and determines which search results consumers see if they search for, say, "girl's pajamas size 4." Amazon is the cashier for every transaction and delivers the goods—that is, the orders are fulfilled by Amazon. At the end of the day, Amazon keeps most of the profit and remits a fraction to Ms. Rubinas.

6. Ms. Rubinas is just one of thousands of affected individuals. Covid-19 devastated her business as the market for discretionary goods dried up; her sales are down 75%. She would be able to scrape by and hold out hope for a better 2021 were it not for CDTFA. In late December, CDTFA issued a surprise levy on her bank account—and then seized thousands of dollars. With her account frozen and funds depleted, Ms. Rubinas will be unable to pay business debts due in late January, which will lead to the destruction of her livelihood.

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[2] *See, e.g.*, Harold Brubaker, "California Hits Philly-Area Amazon Seller with $1.6 Million Sales-Tax Bill," *The Philadelphia Inquirer* (November 5, 2019), https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html (reporting how CDTFA has targeted "hundreds of thousands of [FBA] merchants" for the taxes that CDTFA let Amazon avoid collecting years earlier).

[3] Declaration of Isabel Rubinas, attached as Exhibit 2.

7. CDTFA's actions violate federal law. ***First***, the Internet Tax Freedom Act prohibits CDTFA from imposing a tax-collection obligation on e-commerce merchants different than the obligation CDTFA imposes on similar brick-and-mortar merchants. Amazon's FBA program is a consignment model. In the brick-and-mortar context, CDTFA requires consignment shops—who interact directly with consumers at the point of sale—to collect taxes. But CDTFA created a different rule to benefit Amazon, which burdens predominantly out-of-state consignment suppliers like Ms. Rubinas. Through the ITFA, Congress specifically outlawed such beneficial treatment for parochial interests. ***Second***, CDTFA lacks personal jurisdiction over Ms. Rubinas based on Amazon's unilateral decision to store FBA goods in Amazon's California warehouses. And without personal jurisdiction over Ms. Rubinas, CDTFA cannot impose tax-collection obligations on her. ***Third***, CDTFA's retroactive imposition of tax liability—to fix a problem of the agency's own wrongful making—violates the Due Process Clause and other restrictions on retroactive changes to the law. ***Fourth***, CDTFA is burdening the participation of a small business in the interstate economy in violation of the Commerce Clause.

Jurisdiction and Venue

8. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case arises under the Constitution and laws of the United States, including the Internet Tax Freedom Act, the Due Process Clause, the Commerce Clause, and 42 U.S.C. § 1983.

9. The Court has personal jurisdiction over defendant Maduros because he has directed tortious conduct at Ms. Rubinas in the Court's Eastern Division, where she resides, including through agents such as CDTFA employee Shannon Hale. At Director Maduros's direction, Ms. Hale pursued Ms. Rubinas in Illinois, seized the bank account Ms. Rubinas opened in Illinois, and withdrew Ms. Rubinas's funds from that account.

10. Venue is proper in the Court's Eastern Division under 28 U.S.C. § 1391 because a "substantial part of the events or omissions giving rise to the claim occurred" within that division.

11. The Tax Injunction Act does not preclude this Court's exercise of jurisdiction because, *inter alia*, California deprives Ms. Rubinas of an adequate state-court remedy to prevent and redress her injuries.

Parties

12. Plaintiff Isabel Rubinas is a resident of Illinois. Through IJR Corp., an Illinois corporation, Ms. Rubinas operates Lollipop Seeds, a children's clothing e-commerce boutique. Lollipop Seeds primarily supplies goods for Amazon's FBA program. Within this complaint, "Ms. Rubinas" generally refers to IJR Corp. and Lollipop Seeds.

13. Defendant Nicolas Maduros is the Director of CDTFA, which is the California state agency responsible for collection of sales and use taxes. Defendant Maduros and CDTFA are residents of California. Prior to 2017, the California Board of Equalization implemented the scheme addressed herein. But after a series of scandals and state and federal criminal investigations, those responsibilities were transitioned to the newly created CDTFA.[4] For simplicity, we generally refer to the agency by its current name.

[4] *See, e.g.*, Patrick McGreevy, "In Massive Shake-Up, Gov. Jerry Brown Breaks Up California's Scandal-Plagued Tax Collection Agency," *L.A. Times* (June 27, 2017), https://www.latimes.com/politics/la-pol-ca-tax-board-overhaul-20170627-story.html (describing how the BOE was "the target of an investigation by the Department of Justice, and its members and employees have been accused by auditors of mismanagement that included putting $350 million in sales taxes in the wrong accounts, and improperly interfering with decisions to open field offices and transfer staff," and how an audit "discovered board members were undermining the executive director and transferring tax collections staff to direct parking and crowd control at conferences that boosted the members' standing in the community").

14. CDTFA operates an office on LaSalle Street, which CDTFA uses to identify and target Illinois businesses for the collection of California taxes as challenged herein.[5]

Factual Allegations Common To All Counts

Amazon's FBA Program

15. Because Amazon's FBA program forms part of the background of this controversy, Ms. Rubinas will provide a brief overview of that program.

16. Amazon's store is the dominant e-commerce store in the country, and is the primary locus of Ms. Rubinas's e-commerce business. Amazon's importance to e-commerce, and small business e-commerce in particular, cannot be overstated. According to some reports, Amazon has nearly half of the entire e-commerce market in the U.S.[6] The closest "competitor," the behemoth Walmart, has less than 10% of the market.[7]

17. The gist of FBA is that Amazon relies on millions of "third-party merchants" like Ms. Rubinas to source goods for Amazon's store. Those merchants identify and source items that might sell in Amazon's store. The merchants convey the goods to Amazon to warehouse, promote, and sell to consumers. That is, Amazon fulfills the order, hence the name, Fulfilled by Amazon. (By contrast, a smaller fraction of sales on Amazon are what Amazon considers "first-party" sales, in which Amazon itself sources the goods.) Both FBA and "first-party" sales arrive in Amazon packaging and are substantively indistinguishable to consumers. FBA has contributed to Amazon's

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[5] CDTFA, "Office Locations & Addresses," https://www.cdtfa.ca.gov/office-locations.htm.

[6] *See, e.g.*, Wayne Duggan, Latest E-Commerce Market Share Numbers Highlight Amazon's Dominance, Yahoo! Finance (Feb. 4, 2020) ("Bank of America estimates Amazon currently has about 44% of U.S. e-commerce market share, up from 40% in 2018. Walmart is a distant second at just 7%, followed by eBay at 5% and Target at just 2%.").

[7] *Id*.

success by allowing the company to externalize various supply chain costs—and by allowing Amazon to offer artificially low prices by avoiding collecting sales tax.

18. As Amazon has testified to Congress, Amazon.com is "our store," and Amazon shoppers are the company's "customers."[8] Amazon's control over Amazon.com, including the FBA program, is total. Third-party merchants like Ms. Rubinas do little more than source products, as suppliers of consigned inventory, for possible sale on Amazon. Merchants propose an offering to Amazon.[9] Amazon has full discretion to approve the products for sale, and to approve or reject the price, using an internal algorithm whose precise features are unknown to merchants. Amazon also retains editorial control over product listings. Amazon also controls where and how products are listed on the site—*i.e.*, the results consumers see when they make searches. Amazon sets the return policy and makes all final decisions when it comes to servicing Amazon's customers, even if that means forcing merchants like Ms. Rubinas to absorb the cost of a refund to Amazon's customers without a return.

19. After Amazon approves a merchant's proposed listing, Amazon will direct the merchant to ship the products to a warehouse of Amazon's choosing. From there, Amazon may keep the goods in that warehouse, or ship them anywhere for positioning, including after breaking up the lot.

20. Amazon is in privity with consumers, whom Amazon deems the company's "customers." By contrast, under the terms of merchants' agreement with Amazon, merchants are

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[8] Written Testimony of Jeffrey P. Bezos, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law (July 29, 2020), https://assets.documentcloud.org/documents/7009139/Jeff-Bezos-Written-Testimony.pdf.

[9] *See* Amazon Services Business Solutions Agreement, https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US.

not in privity with consumers. Amazon prohibits marketing contact between suppliers and customers, so as to preserve Amazon's relationship with the customer and limit competition from, say, the supplier's own website.

21. After a consumer purchases a product, Amazon is responsible for selecting the warehouse from which to draw the product, packing the product, and shipping it to the consumer. Amazon also collects payment, and—after holding onto the funds for several weeks—credits the merchant's account. On FBA sales, Amazon charges merchants a commission that can reach 45%. FBA is critical to survival on Amazon despite the high commission. FBA can account for over 90% of sales for many merchants, including Ms. Rubinas.

22. To avoid liability, Amazon has likened itself to a mall or flea market, but that characterization fails the common-sense test. No mall controls essentially every element of every consumer transaction. The Water Tower Place, for example, does not dictate what all of the dozens of stores inside offer and at what price. Nor does it mediate all of their interactions with consumers. Nor does it run the cash registers. Nor does it store goods in its proprietary warehouses and deliver them in Water Tower Place packaging. The list of differences could go on, which is why courts that have examined the reality of Amazon's operations have rejected the company's self-characterizations as "absurd."[10]

23. As California's courts have recognized, "[a]s a factual and legal matter, Amazon place[s] itself between [suppliers] and [consumers] in the chain of distribution . . . . Amazon accept[s] possession of the product, . . . store[s] it in an Amazon warehouse, attract[s] [consumers] to the Amazon website, provide[s] [consumers] with a product listing . . . , receive[s] [consumer]

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[10] *Amazon Services, LLC v. S.C. Dep't of Rev.*, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019), https://src.bna.com/Leb (rejecting Amazon's contortive attempts to avoid the obvious).

payment for the product, and ship[s] the product in Amazon packaging . . . ." *Bolger v. Amazon.com, LLC*, 53 Cal. App. 4th 431, 438 (2020), *review denied*, 2020 Cal. LEXIS 7993 (Cal. 2020). As the *Bolger* court explained, "Amazon act[s] as an intermediary between an upstream supplier [*e.g.*, Ms. Rubinas] and the ultimate consumer. Amazon accept[s] an order for a product, bill[s] the consumer, and remit[s] the proceeds to the upstream supplier." *Id*. at 450. Amazon goes "further. It [takes] possession of the product, so it fulfill[s] the consumer's order directly." *Id*. Given Amazon's "pivotal" control over the FBA products the company warehouses, markets, and sells, the law has little trouble holding Amazon liable for FBA sales on Amazon.com. *Id*. at 438.

24. Once merchants like Ms. Rubinas transfer custody of their goods to Amazon, they have no say in where Amazon moves the goods. To implement FBA, Amazon has a network of more than 180 fulfillment and sortation centers around North America.[11] Amazon no doubt has a sophisticated algorithm for where it stores items, but that algorithm is unknown to merchants and beyond their control. Amazon has several FBA facilities in California, where the company unilaterally chooses to store suppliers' goods. Ms. Rubinas has no control over which warehouse or warehouses Amazon chooses to use for storage. She cannot order Amazon to use or not use warehouses in certain states. Nor can she order Amazon to pull goods out of certain states. When a consumer makes a purchase, Ms. Rubinas cannot tell Amazon which warehouse to ship the item from. Nor can she realistically "cancel" sales from particular warehouses or to particular locations.

25. The following FBA fact pattern is representative. Say that Ms. Rubinas, located in Chicago, sources children's pajamas and proposes a listing to Amazon. After Amazon approves the listing, Amazon directs her to ship a lot of ten pairs of pajamas to the nearest warehouse in

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[11] Seller Essentials, Amazon Warehouse Locations, https://selleressentials.com/amazon/amazon-fulfillment-center-locations/.

Cicero. Her role in the process is essentially over—Amazon now has control over "our inventory of your products."[12] Amazon unilaterally decides to break up the lot, keeping some of the inventory in the Midwest, and positioning the rest around the country. Months later, an Amazon customer in Sacramento searches for pajamas. Amazon decides which results to display. Assume that Amazon's customer unknowingly chooses the pajamas that happen to be stored in California—perhaps because Amazon displayed that result first. The customer places an order, Amazon accepts, and Amazon chooses to fulfill that order from the Stockton warehouse rather than others because Amazon's shipping costs are lower—which may well be why Amazon displayed that item first. Or maybe Amazon orders Ms. Rubinas to ship to a warehouse in California, after which Amazon chooses to keep some pieces in that state and move other pieces elsewhere. Ultimately, to the extent there is any connection between Ms. Rubinas and California, it is because of Amazon's unilateral choices—which constrains California's power to regulate or tax Ms. Rubinas.

California's FBA Tax Regime

26. The basic framework of California sales and use tax, which has existed for decades and is similar to that of the other forty-four states that tax sales of personal property, is that in-state retailers collect sales tax from the consumer at the point of sale, and then pass those collected amounts on to the state. Use tax applies in the case of non-California sales. California consumers are liable for use taxes, but California may under some circumstances seek for non-California retailers to collect those taxes from consumers and remit them to the state. With respect to non-

[12] Amazon, Business Solutions Agreement at F-5 Fulfillment, https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US.

California retailers, California law treats use tax obligations as a form of debt (or penalty for failure to collect the tax), rather than a tax *per se*.[13]

27. One would expect Amazon to collect and remit the sales tax: it's Amazon's store; Amazon has physical custody of the items; Amazon chose to store the items in California; Amazon approves the listing, processes the sale, transfers the items to the customer, and collects payment.[14] Until very recently, however, Amazon successfully defied its collection obligations, costing California billions in uncollected sales tax.

28. To demonstrate the absurdity of the situation, in a single checkout, Amazon might collect tax for its first-party sales while refusing to collect taxes from FBA sales in the same "shopping cart."

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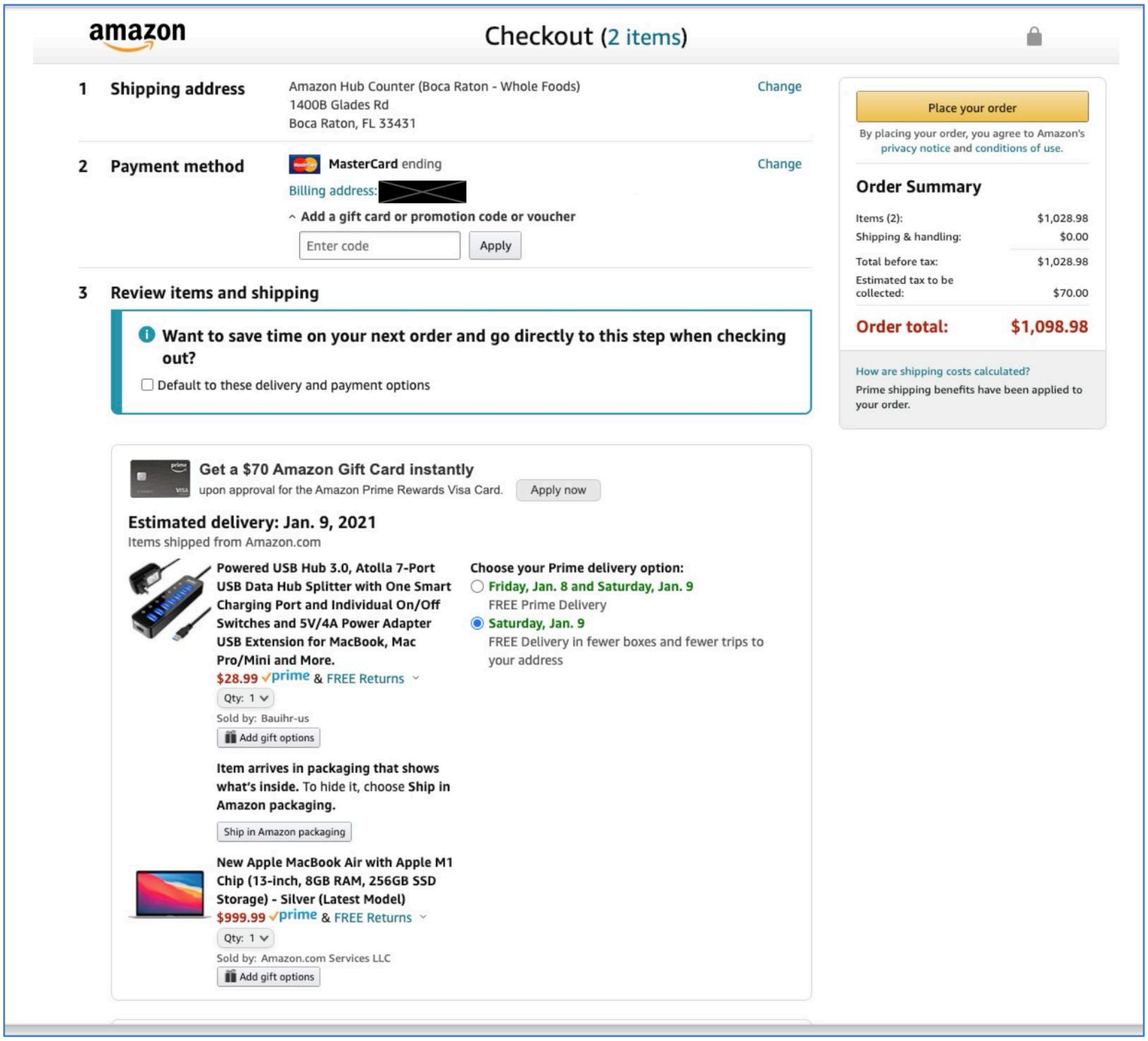
[13] Cal Rev. & Tax Code § 6204; *Bank of America v. Board of Equalization*, 209 Cal. App. 2d 780, 800 (1962) ("the liability of the retailer under section 6204 . . . is for a debt rather than for taxes").

[14] *See, e.g.*, Cal Rev. & Tax Code § 6014-15 (providing statutory definitions of those obligated to collect sales taxes that match Amazon's conduct); Cal. Reg. 1569 ("A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer. Tax applies to his gross receipts from such a sale.").


amazon
Checkout (2 items)
1 Shipping address
Amazon Hub Counter (Boca Raton - Whole Foods)
1400B Glades Rd
Boca Raton, FL 33431
Change
2 Payment method
MasterCard ending
Billing address: [redacted]
Add a gift card or promotion code or voucher
Enter code
Apply
Change
3 Review items and shipping
Want to save time on your next order and go directly to this step when checking out?
Default to these delivery and payment options
Get a $70 Amazon Gift Card instantly
upon approval for the Amazon Prime Rewards Visa Card.
Apply now
Estimated delivery: Jan. 9, 2021
Items shipped from Amazon.com
Powered USB Hub 3.0, Atolla 7-Port USB Data Hub Splitter with One Smart Charging Port and Individual On/Off Switches and 5V/4A Power Adapter USB Extension for MacBook, Mac Pro/Mini and More.
$28.99 prime & FREE Returns
Qty: 1
Sold by: Bauihr-us
Add gift options
Item arrives in packaging that shows what's inside. To hide it, choose Ship in Amazon packaging.
Ship in Amazon packaging
Choose your Prime delivery option:
Friday, Jan. 8 and Saturday, Jan. 9
FREE Prime Delivery
Saturday, Jan. 9
FREE Delivery in fewer boxes and fewer trips to your address
New Apple MacBook Air with Apple M1 Chip (13-inch, 8GB RAM, 256GB SSD Storage) - Silver (Latest Model)
$999.99 prime & FREE Returns
Qty: 1
Sold by: Amazon.com Services LLC
Add gift options
Place your order
By placing your order, you agree to Amazon's privacy notice and conditions of use.
Order Summary
Items (2): $1,028.98
Shipping & handling: $0.00
Total before tax: $1,028.98
Estimated tax to be collected: $70.00
Order total: $1,098.98
How are shipping costs calculated?
Prime shipping benefits have been applied to your order.

29. This screen capture of an exemplar Amazon transaction highlights the nature of Amazon's tax avoidance scheme, the consequences of which are being placed on Ms. Rubinas. This example uses Florida, as one of a handful of states that still allows Amazon to sell goods tax-free (unlawfully); the example represents what a California transaction would have looked like during the time period at issue in this case. In this picture, two products are placed in a single shopping cart for checkout. One item, the Apple MacBook Air, is sourced directly from Apple by Amazon and represented to the customer as "sold by Amazon Services LLC" to the customer. The other product, the USB Hub, is sourced by Bauihr-us, which is whom Amazon

deems to be the purported seller. The sales tax rate in Palm Beach County, Florida, the destination address, is 7%. Therefore, the $70 of tax collected in this transaction shows that Amazon only takes responsibility for collecting tax on one out of the two items in the consumer's shopping cart, the $999.99 MacBook, and not the USB Hub. The whole transaction is governed by Amazon's terms and conditions and contract with its customer, as it would be if the consumer only purchased the USB Hub. Even more striking is that the place of delivery is not the consumer's home, but inside Amazon's subsidiary company Whole Foods. This further highlights the absurdity of Amazon's tax avoidance scheme—Apple could not sell the same computer tax-free from its own store in the same town—and the corruption that has led California's tax authorities to look the other way and seek to recover their lost tax revenue from out-of-state merchants who supply the Amazon store, versus Amazon itself.

30. The origins of that scheme have emerged through intrepid reporting and whistleblowing. As *The Philadelphia Inquirer* reported, "[w]hen Amazon opened its first warehouse in California in 2013, it escaped the obligation to collect the taxes on sales by third-party merchants on the company's site, apparently by convincing state officials that it was not the retailer obligated to collect sales tax in those cases—a distinction that has since been undermined by court decisions in South Carolina, Pennsylvania, and elsewhere."[15]

31. Around that time, when Amazon was building up the FBA program, states like California were seeking to tax online sales and correct the advantage that Amazon had over brick-and-mortar retailers. Amazon fought collecting taxes, until "cut[ting] a deal" to abandon the

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[15] Harold Brubaker, "California Hits Philly-Area Amazon Seller with $1.6 Million Sales-Tax Bill," *The Philadelphia Inquirer* (November 5, 2019), https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html; *see also Amazon Services, LLC v. S.C. Dep't of Rev.*, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019), https://src.bna.com/Leb.

company's ballot initiative to change California tax law in exchange for an additional tax-free year.[16]

32. As Amazon's tax-free year was ending, CDTFA was apparently planning to treat Amazon like any other store—*i.e.*, the agency would require the company to collect sales tax on all of its sales. In September 2012, CDTFA told reporters that Amazon would have to collect taxes on FBA orders it fulfills: "Since Amazon is handling the merchandise and all aspects of the sale, the [CDTFA] would consider them the retailer, and Amazon would have to collect tax on the transaction."[17] Here is the email from CDTFA's Deputy Director—second in command—to the media:

> On 9/10/12 4:35 PM, Stromberg, Venus wrote:
> > Hi Declan,
> >
> > Deputy Director Garza asked me to respond to your inquiry.
> >
> > The following should be attributed to the California State Board of
> > Equalization. If you need a quote or interview, I will put you in >
> contact with a spokesperson.
> >
> > Based on our understanding of how FBAs function in regards to
> Amazon, > Amazon has possession of the property and the power to
> transfer title to > the consumer. Since Amazon is handling the
> merchandise and all aspects > of the sale, the Board of Equalization
> would consider them the retailer, > and Amazon would have to collect tax on the transaction.
> >
> > I hope this information is helpful.
> >
> > Contact the office if you have any further questions.
> >
> > Venus Stromberg
> >
> > Office of Public Affairs

[16] Jay Greene, "Amazon and California Lawmakers Cut Sales Tax Deal," *CNET.com* (September 8, 2011), https://www.cnet.com/news/amazon-and-california-lawmakers-cut-sales-tax-deal/.

[17] Declan McCullagh, "Amazon Shoppers Will Squeeze Through California Tax Loophole," *CNET.com* (September 11, 2012), https://www.cnet.com/news/amazon-shoppers-will-squeeze-through-calif-tax-loophole/.

33. But hours after the reporter then asked Amazon for a quote in response, CDTFA issued a late-night "updated" position: Amazon would retain its tax advantage over competing retailers by refusing to collect tax on FBA sales.[18]

34. Amazon's artificially lower prices gave the company a significant pricing advantage over brick-and-mortar stores and online competitors who did collect sales tax. Consumers, predictably, shopped in the store with lower prices, which helped contribute to the downfall of various retailers. The artificially low prices also helped lure consumers to enroll in Amazon Prime, which was key to Amazon's growth strategy. As the House Antitrust Subcommittee concluded after a sixteen-month investigation, "Amazon expanded its market power through avoiding taxes [and] extracting state subsidies."[19] As *Capital & Main* observed, "It's highly likely that Amazon clears more profit than marketplace sellers on their transactions. So Amazon, by proxy, benefits financially from third-party tax avoidance, and the pricing advantage it provides. And, by not collecting tax, Amazon even avoids liability for mistakes made by third-party sellers that could trigger audits."[20] That is part of Amazon's overall strategy: "Amazon's continuous resistance to collecting sales taxes made it the first major American company to build its business based on tax avoidance. Contrary to popular belief, the company is still resisting today."[21]

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[18] *Id.*

[19] U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations" at 261, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[20] David Dayen, "The 'Amazon Tax' Ruling: Disrupting the Disruptors?," *Capital & Main* (July 10, 2018), https://capitalandmain.com/the-amazon-tax-ruling-disrupting-the-disruptors-0710.

[21] *Id.*

35. Why would California let Amazon escape paying billions of dollars in sales taxes? According to California Treasurer Ma, recounting her efforts to make Amazon collect taxes during her time as chair of CDTFA's predecessor agency, the answer was simple: the "[n]umber one" reason was that "the governor's office has been trying to woo Amazon into putting a headquarters here. I've been pushing [on tax collection] and they haven't wanted to do anything up front."[22] That regulatory favoritism is of a piece with other giveaways to Amazon. For example, California offered Amazon hundreds of millions in "incentives" and bespoke regulation for a favored business to locate HQ2 in the state.[23] Had the rule of law prevailed at that time, California would have its tax revenues and Ms. Rubinas and thousands of other Americans would not find themselves being made to pay for California's political choices.

36. The sales tax piece of the giveaway scheme ended in late 2019, when Amazon agreed to begin collecting taxes pursuant to California's new "marketplace facilitator" law. But what about the taxes Amazon refused to collect for the prior decade? That's where CDTFA's pursuit of Ms. Rubinas and others like her comes in.

37. CDTFA is now trying to clean up for Amazon's decade of tax avoidance. But rather than looking to Amazon, CDTFA has actually partnered with Amazon to go after non-resident

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[22] *Id.* At the time, Treasurer Ma was Chair of the California Board of Equalization—i.e., the state's top tax collector. She had investigated Amazon's tax practices and operations within the state. See August 31, 2017 Letter from Fiona Ma, Chair, BOE, to Keely Martin Bosler, Cabinet Secretary, Office of Governor Brown, attached as Exhibit 4. Later, she was instrumental in exposing the scandals at BOE that led to the creation of CDTFA. As Treasurer, she has continued to advocate for CDTFA to comply with the law.

[23] Jeff Collins, "Gov. Brown Pledges Hundreds of Millions in Incentives for Amazon HQ2 in California," *The Orange County Register* (October 18, 2017), https://www.ocregister.com/2017/10/18/brown-pledges-hundreds-of-millions-in-tax-incentives-for-amazon-hq2/ (documenting hundreds of millions in tax credits, "employment training funds," property tax abatement, a "'strike team' to expedite all permits and approvals," promised legislation to "streamlin[e]" the CEQA approval process, etc.).

small businesses that lack Amazon's political and economic power in the state. The agency has targeted "hundreds of thousands of third-party merchants on Amazon who were informed by [CDTFA] that *they* should have been collecting taxes on sales to California residents as far back as 2012."[24]

38. Using names and email addresses supplied by Amazon, CDTFA has targeted the online merchants who supply goods to Amazon for Amazon's store. CDTFA's tactics go beyond what even the most brazen private debt collector, mindful of the Fair Debt Collection Practices Act and other restraints on debt collection, would attempt. CDTFA agents have been demanding that non-residents register with the state to collect sales tax on pain of jail time. For example, CDTFA personnel have unilaterally concluded that merchants must register with the state, and then warned merchants that if they "choose not to voluntarily [*sic*] comply to obtain a sellers permit," they could be "guilty of a felony," fined thousands of dollars, and "imprison[ed] for 16 months, two years, or three years."[25] When merchants register for prospective tax collection, CDTFA then goes after the merchants for retrospective taxes back to 2012.[26] Because Amazon did not collect sales tax on its sales during that period, Amazon's merchants do not have the tax

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[24] Harold Brubaker, "California Hits Philly-Area Amazon Seller with $1.6 Million Sales-Tax Bill," *The Philadelphia Inquirer* (November 5, 2019), https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html (emphasis added).

[25] CDTFA Correspondence to Amazon FBA Suppliers (emphasis added), Exhibit 3.

[26] February 2018 Email from CDTFA to Amazon FBA supplier ("Your company is required to file Sales and Use Tax returns on a Quarterly basis with a start date of 9/5/2012. All sales of tangible personal property are retail sales and subject to tax, unless supported by documentation as being exempt.").

receipts to turn over to CDTFA. Payments would have to come out of revenue or other sources—money that Ms. Rubinas and merchants like her in general do not have.[27]

39. Merchants have received seven-figure "assessments" backed up by threats of criminal prosecution. One illustrative target received a CDTFA demand for $1.6 million for just a six-month period in California, which exceeded the plausible taxes on "every sale [the merchant has] ever done."[28] After the merchant pointed out the obvious error, CDTFA cut the assessment to approximately $25,000 for just one quarter—raising serious questions about the good-faith basis for the original demand. Observers have seen a similar pattern in which CDTFA will make large demands on other merchants, untied to the sales at issue, apparently to gain negotiating leverage through fear.

40. Ms. Rubinas is among CDTFA's targets. In 2019, CDTFA contacted her and represented that her business, Lollipop Seeds, owed California use taxes because Amazon chose to store in California items she supplied to Amazon. Ms. Rubinas trusted CDTFA and its agent, Ms. Hale, so she registered with the agency and paid the taxes reportedly due for 2019. She also provided Ms. Hale with data about her business. And then Ms. Hale demanded taxes back to 2017—more than $10,000—which Ms. Rubinas does not have. What California wants is more than Ms. Rubinas's entire profits for 2020. Ms. Rubinas informed Ms. Hale of the hardship, but the agency persisted.

41. The two lost touch during the pandemic. On Saturday, December 19, 2020, Ms. Rubinas opened her mail and was "horrified to find a notice from Chase Bank stating that they had

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[27] *See, e.g.*, California is Clobbering Small Businesses with a Retroactive Tax Grab, *The L.A. Times* (December 28, 2020), https://www.latimes.com/opinion/story/2020-12-28/california-online-sales-tax-retroactive-collection.

[28] *The Philadelphia Inquirer*, *supra*.

frozen [her] bank account on orders from CDTFA."[29] Ms. Rubinas's business almost failed on Christmas Day, when her recurring loan payment to Amazon came due. (Amazon offers financing to participate in FBA, which imposes another level of control over the company's suppliers.) Ms. Rubinas had just enough funds for that payment to clear. But when Amazon tries to take out a payment for storage fees in mid-January, there will be insufficient funds. That will likely lead Amazon to put Ms. Rubinas in default, seize and liquidate her inventory, and seize any other funds in her Amazon sales account. Meanwhile, Ms. Rubinas has other mounting obligations to her suppliers, and is selling inventory at below-cost prices to try and free up cash. But it likely will not be enough. CDTFA's actions—culminating in a levy—will destroy her business.

42. Given the scandalous history and impacts on real people, how does CDTFA justify its tax grab? Not by adherence to the Constitution or the rule of law, but by fiat. According to CDTFA, Amazon's storage choices give the agency unfettered power over non-residents like Ms. Rubinas. The agency contends that non-resident merchants like Ms. Rubinas are "*required* to collect and pay sales and/or use tax" if, *inter alia*, they "use, *directly or indirectly*, or through a subsidiary or agent, a . . . . place of distribution, . . . warehouse or storage place, or other physical place of business in California."[30] CDTFA publications elaborate: "If you use a California fulfillment center to store your inventory, you are required to register with the CDTFA and file sales and use tax returns."[31] CDTFA's definition of "fulfillment center" tracks and is modeled on

[29] Rubinas Declaration at ¶ 9.

[30] CDTFA, "Do You Need to Register with California?," https://www.cdtfa.ca.gov/industry/out-of-state-retailers.htm#Registration (first emphasis in original; second added).

[31] CDTFA, "Publication 77, Out-of-State Sellers: Do You Need to Register with California?, Examples," https://www.cdtfa.ca.gov/formspubs/pub77/#examples.

Amazon's FBA program: "A fulfillment center is a location, generally a warehouse facility, where orders for tangible merchandise are received, packaged, and picked up by a common carrier for shipment to the customer."[32]

43. As applied to Amazon's FBA program, then, CDTFA purports to require foreign citizens whose goods Amazon unilaterally chooses to store in California to register with the agency and collect state and district tax on Amazon's sales of those goods. The Due Process Clause commands otherwise—personal jurisdiction must arise from the putative subject's relevant actions, not from those of a third-party. To the extent the agency even considered due process before launching its policy, the agency and its agents are willfully or recklessly violating settled law.

44. CDTFA's policy likewise violates the Internet Tax Freedom Act, which requires states to impose the same tax-collection obligations on online and brick-and-mortar businesses. California requires brick-and-mortar consignment stores to collect taxes, and has done so for nearly a century.[33] After all, consignment store operators are at the point-of-sale and can ensure that taxes are collected from their customers. As the agency explains to consignment stores, "You are responsible for . . . paying the sales tax on the retail selling price of consignment sales when you: have possession or control of the item you are selling, and can transfer ownership or use of the item to the buyer without further action on the part of the owner."[34] But CDTFA does the

[32] CDTFA, "Publication 109, Internet Sales, Online Marketplaces and Fulfillment Centers," https://www.cdtfa.ca.gov/formspubs/pub109/#online.

[33] *See* CDTFA, Reg. 1569, "Consignees and Lienors of Tangible Personal Property for Sale," https://www.cdtfa.ca.gov/lawguides/vol1/sutr/1569.html ("effective August 1, 1933").

[34] CDTFA, "Publication 114, Consignment Sales," https://www.cdtfa.ca.gov/formspubs/pub114/#Sales.

opposite in the e-commerce setting—at least when it benefits Amazon at the expense of politically-powerless non-residents. The agency places the tax collection obligation on consignment suppliers like Ms. Rubinas. That unequal burdening of non-resident e-commerce merchants is exactly why Congress passed the Internet Tax Freedom Act—to protect the national economy from parochial favoritism.

45. The fallout from Amazon's tax avoidance has become a national problem. California is the most aggressive state, but is not the only state that gave Amazon a pass and is now looking to weaker parties to foot the bill. Wisconsin tax officials have admitted that the state gave Amazon tax-free treatment to lure a planned warehouse from Illinois to Kenosha. Following California's lead, Wisconsin is now targeting Amazon's suppliers like Ms. Rubinas for Amazon's back taxes.[35] Washington State has pursued non-residents for Amazon's back taxes because Amazon directed consumers to return a single item to an Amazon warehouse in Washington. Massachusetts and other states have taken a similar posture. Much of the effort is run through the Multistate Tax Commission, which some states use to collaborate on tax enforcement policy.[36] The combined effect is crushing small businesses—just when the pandemic is hitting them too.

Causes of Action

COUNT I

CDTFA's Discrimination Violates the Internet Tax Freedom Act.

46. Ms. Rubinas incorporates the foregoing paragraphs as if set forth herein.

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[35] Tripp Baltz, "Amazon Sellers Hit by Huge Back-Tax Across the Country," (March 2, 2020) https://news.bloombergtax.com/daily-tax-report-state/amazon-sellers-hit-by-huge-back-tax-bills-across-the-country.

[36] *See, e.g.*, Multistate Tax Commission, "FAQs for the Online Marketplace Sellers Voluntary Disclosure Initiative," http://www.mtc.gov/Nexus-Program/Online-Marketplace-Seller-Initiative/FAQ.

47. The Internet Tax Freedom Act (ITFA) prohibits California from, *inter alia*, imposing "discriminatory taxes on electronic commerce," which are defined as taxes that are "not generally imposed and legally collectible . . . on transactions involving similar property, goods, services or information accomplished through other means."[37] The ITFA further prohibits California from imposing on electronic commerce "an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means."[38]

48. Amazon FBA is a consignment store. CDTFA imposes the tax-collection obligation on brick-and-mortar consignment stores.[39] CDTFA does the opposite in the e-commerce setting—at least where it benefits Amazon—by taking the tax obligation from the consignment store and placing it on suppliers like Ms. Rubinas.

49. That discriminatory treatment of e-commerce burdens the interstate economy and violates the ITFA.

50. CDTFA's violations of the ITFA are causing Ms. Rubinas irreparable injury.

COUNT II
CDTFA's Demand for Money and Seizure of Ms. Rubinas's Bank Account Violates the Due Process Clause.

51. Ms. Rubinas incorporates the foregoing paragraphs as if set forth herein.

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[37] Internet Tax Freedom Act Section 1101(a); Section 1105(2), codified at 47 U.S.C. § 151, Note.

[38] *Id.*

[39] *See* CDTFA, Reg. 1569, "Consignees and Lienors of Tangible Personal Property for Sale," https://www.cdtfa.ca.gov/lawguides/vol1/sutr/1569.html ("effective August 1, 1933"); CDTFA, "Publication 114, Consignment Sales," https://www.cdtfa.ca.gov/formspubs/pub114/#Sales.

52. By demanding and seizing under threat of criminal and civil punishment money from a non-resident over whom California lacks personal jurisdiction, CDTFA is violating the Fourteenth Amendment's Due Process Clause in multiple ways.

53. California lacks personal jurisdiction over Ms. Rubinas for the Amazon sales in question. In the tax context, a state must have "nexus" to exercise power over a non-resident. The Supreme Court has long recognized two independent aspects of "tax nexus" that a state must satisfy to regulate a non-resident. One aspect arises from the Due Process Clause; the other from the Commerce Clause. Although they are "closely related," the Due Process Clause and the Commerce Clause "pose distinct limits on the taxing powers of the States. Accordingly, while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause"—or vice versa. *Quill Corp. v. N.D.*, 504 U.S. 298, 305 (1992) (quoting *Bella Hess v. Dep't of Rev. of Ill.*, 386 U.S. 743, 756 (1967); citing *Tyler Pipe Indus., v. Wash. State Dep't of Rev.*, 483 U.S. 232 (1987)). The two clauses "reflect different constitutional concerns" and are "analytically distinct." *Quill Corp.*, 504 U.S. at 305. And "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause." *Quill Corp.*, 504 U.S. at 305 (citation omitted).

54. Among other aspects, the Due Process Clause imposes personal jurisdiction-based limits on state authority to regulate non-residents. The familiar personal jurisdiction rules from the litigation context have long applied in the tax context. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (describing the "minimum contacts" requirement).

55. CDTFA is purporting to regulate and tax Ms. Rubinas even though the agency lacks personal jurisdiction over her. She is a non-Californian. CDTFA bases its jurisdictional claim not

on her deliberately seeking the protection of California's laws, but on Amazon's unilateral decision to store items in Amazon's possession in Amazon's California warehouses and ship orders to Amazon's California customers—not Ms. Rubinas's customers—from those warehouses. That is jurisdictionally wrong: Amazon's unilateral actions do not give California power over Ms. Rubinas. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 284 (2014); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

56. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to Ms. Rubinas. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate her due-process rights.

COUNT III

CDTFA's Demands Are Unlawfully Retroactive.

57. Ms. Rubinas incorporates the foregoing paragraphs as if set forth herein.

58. With limited exceptions, taxing authorities cannot impose retroactive tax obligations—and certainly not tax obligations stretching back years. Various laws, including the Commerce Clause, the Due Process Clause, and the Takings Clause, prohibit excessive retroactive taxes of the type at issue here.

59. For most of the period in question, CDTFA knowingly permitted Amazon to refuse to collect taxes in the company's store—*i.e.*, the agency did not have or enforce a policy requiring the collection of taxes on Amazon sales. At some point in late 2018 or early 2019, however, CDTFA changed the "rules" and began to publicly target Amazon's suppliers in an open manner; Ms. Rubinas herself did not receive notice until 2019.

60. Rather than enforcing its new "rules" on a prospective basis, CDTFA has enforced them back to at least 2012—and in the case of Ms. Rubinas, back to at least 2016.

61. CDTFA's retroactive demands are unlawful and are causing Ms. Rubinas irreparable injury.

COUNT IV

CDTFA's Actions Violate the Commerce Clause

62. Ms. Rubinas incorporates the foregoing paragraphs as if set forth herein.

63. CDTFA's conduct is imposing a significant burden on Ms. Rubinas's ability to operate in the interstate marketplace. Meanwhile, CDTFA is privileging in-state interests such as Amazon's investments in the state and protecting itself from political retribution for failing to collect taxes owed to the state.

64. Further, CDTFA is depriving Ms. Rubinas of the protections for non-resident small businesses that the Supreme Court established in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). Under *Wayfair*, states may not impose tax-collection obligations on non-resident small businesses below a certain threshold, because doing so would unduly burden their participation in interstate commerce.

65. CDTFA's actions are both discriminatory and unduly burdensome, in violation of the Commerce Clause.

66. CDTFA's conduct is causing Ms. Rubinas irreparable injury.

Prayer for Relief

67. Ms. Rubinas respectfully requests the following relief:

a. A declaration pursuant to 28 U.S.C. § 2201 that CDTFA's conduct and application of California law to her is unconstitutional;

b. An order and judgment enjoining CDTFA from further such constitutional violations;

c. Return of the unlawfully seized funds;

d. Costs and attorney's fees pursuant to 42 US.C. § 1988 and any other applicable laws;

e. Damages for CDTFA's violation of the U.S. Constitution and the Internet Tax Freedom Act where available under law; and

f. All other appropriate relief.

Jury Demand

Plaintiff demands a jury trial on all issues so triable.

Respectfully submitted this 7th day of January 2021.

s/ Paul K. Vickrey
Paul K. Vickrey
Vitale, Vickrey, Niro, Solon & Gasey LLP
311 S. Wacker Drive, Suite 2470
Chicago, IL 60606
Phone: (312) 236-0733
vickrey@vvnlaw.com

s/ Aaron K. Block
Aaron K. Block
The Block Firm LLC
Georgia Bar No. 508192*
4200 Northside Parkway NW
Building 1, Suite 200
404-997-8419
aaron@blockfirmllc.com
(Application for admission pro hac vice pending)

s/ Paul S. Rafelson
Paul S. Rafelson
Rafelson Schick, PLLC
Florida Bar No. 16958
2255 Glades Road, Suite 319
Boca Raton, Florida 33431
561-326-6529
paul@frsattorneys.com

(Application for admission pro hac vice pending)

Counsel for Plaintiff, Isabel Rubinas